

1 briefing was filed on January 31, 1990.

2 Attorney James A. Dougherty, represented Beach Drive Northeast
3 Association. Attorney Thomas C. Evans, represented the City of Lake
4 Forest Park. Assistant Attorneys General Susan P. Jensen, Deborah L.
5 Cade and John Hurley represented the Department of Transportation.
6 King County was represented by Deputy Prosecuting Attorney, Joel
7 Paisner. Reporters with Gene Barker and Associates (Olympia) took the
8 proceedings.

9 Final Findings of Fact, Conclusions of Law and Order wre issued
10 on July 6, 1990. The Board affirmed King County's issuance of a
11 shoreline substantial development permit with the exception of
12 conditions relating to stormwater drainage and remanded the permit to
13 the County for action consistent with Conclusion 6. The Board
14 reversed the City of Lake Forest Park's denial of a shoreline
15 substantial development and remanded to the City for issuance of a
16 permit consistent with the Opinion.

17 The City of Lake Forest Park appealed the matter to Superior
18 Court of King County. Upon Board motion, the matter was remanded to
19 the Shorelines Hearings Board. A transcript was prepared and filed.
20 In December 1991, the Board issued the previous decision as Proposed
21 and requested the filing of Exceptions. Past participating members
22 Wick Dufford, William Derry and Dennis Derrickson are no longer with
23 the Board.

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1 Lake Forest Park filed a Motion Objecting to the Proceedings.
2 Reply was filed. The Motion was denied.

3 Lake Forest Park filed Exceptions on 2/18/92 and, more detailed
4 Exceptions on April 14, 1992 with specific references to the
5 transcript and to exhibits. The Department of Transportation filed
6 Reply on April 29, 1992.

7 The entire Record of Proceedings was made available to the
8 Shorelines Hearings Board for their review. Participating for the
9 Board were Members: Judith A. Bendor, Attorney Member; Harold S.
10 Zimmerman, Chairman; Nancy Burnett, David Wolfenbarger and O'Dean
11 Williamson. Member Annette S. McGee recused herself.

12 All members having reviewed the record, the Exceptions and Reply,
13 and having conferred and deliberated, now issue this decision.

14 PROCEDURAL BACKGROUND

15 The Department of Transportation (WSDOT) issued a Determination of
16 Non-significance (DNS) under the State Environmental Policy Act (SEPA)
17 on June 30, 1986, for the proposed highway project.

18 King County granted a shoreline substantial development permit
19 for those portions of the project within its jurisdiction on November
20 17, 1987. On December 10, 1987, Beach Drive Northeast Association
21 (BDNA) appealed this decision to the Shorelines Hearings Board (SHB
22 No. 87-50). Thereafter, the proceedings were continued, pending a
23 decision of the City of Lake Forest Park on a substantial development
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1 permit for the portions of the project within its boundaries.

2 On September 21, 1988, the City Lake Forest Park denied the
3 permit application. This decision was memorialized and filed with the
4 Department of Ecology on November 22, 1988. The WSDOT appealed to the
5 Shorelines Hearings Board (SHB No. 88-47). On December 7, 1988 the
6 Board consolidated the two appeals for hearing. Various preliminary
7 motions followed, including a Motion to Dismiss by the City. These
8 matters were heard on April 28, 1989. The Motion to Dismiss was
9 denied.

10 On May 16, 1989, a pre-hearing conference was held resulting in
11 the scheduling of the hearing for dates in November 1989. On June 2,
12 1989, the Board entered a Pre-Hearing Order setting forth Agreed
13 Issues as follows:

14 1. Whether the proposed development is consistent with RCW
15 90.58.020, the King County Shoreline Master Program, and the City of
Lake Forest Park Shoreline Master Program as regards:

- 16 a. Noise impacts of the proposed development on the Lake Forest
17 Park shoreline;
18 b. Aesthetic impact of the proposed development, particularly
19 with regard to the loss of vegetation and with regard to the
20 retaining wall;
21 c. Reduction in access at SR 522's intersection with Ballinger
22 Way, and at Brookside;
23 d. Surface water drainage from the proposed development;
24 e. Negative impact on Lake Forest Park's shoreline by failure to
25 incorporate a water main and fire hydrants at WSDOT's expense;
26 f. Regional benefits of the project;
27 g. Air quality;
h. Impacts on eagle habitat;

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- i. Consideration of the alternative of "repositioning";
- j. Permanent impacts on recreational use of the Burke-Gilman Trail;
- k. Impacts on the value of residential properties on Beach Drive Northeast?

2. Whether the proposed project is consistent with the Lake Washington Regional Plan as regards:

- a. The "policy statement" that transportation systems should "stay within existing corridors"?
- b. Failure to select a "border route" for transit vehicles rather than a "cross Lake Washington" route?
- c. The "circulation element" encouraging alternatives to automobile transportation?
- d. The "conservation element"?

3. Whether the DNS issued by WSDOT was correct?

4. Whether Lake Forest park may assert SEPA issues in this proceeding?

5. Whether Lake Forest Park has in place a duly adopted shoreline master program? This issue contemplates that other ordinances such as the Lake Forest Park Comprehensive Plan may or may not have been adopted as the Lake Forest Park Shoreline Master Program. It is not the intention of this issue however, to provide for review under the comprehensive plan per se.

6. Whether Lake Forest Park may assert as grounds for denial, impacts on portions of the shoreline not within the city limits?

7. Whether Lake Forest Park may assert as grounds for denial, impacts upon portions of the City not within the shoreline?

8. Whether Lake Forest Park may assert as grounds for denial, impacts based on conversion of the transit lane to a general purpose lane?

9. Whether Beach Drive Northeast Association may assert impacts upon shoreline of the City of Lake Forest Park?

At the pre-hearing conference, WSDOT filed a Motion for Partial Summary Judgement asking for an order precluding the City from raising

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1 any issues under SEPA. After briefing by the parties, the Board on
2 September 18, 1989, granted the Motion, disposing thereby of Issue No.
3 4, as set forth in the Pre-Hearing Order. A copy of that ruling is
4 annexed hereto as Attachment A.

5 At the outset of the hearing Issue No. 1(h) (eagle habitat) was
6 withdrawn.

7 FINDINGS OF FACT

8 1

9 The proposed project is an additional paved lane running 2.5
10 miles along eastbound State Route 522. The lane would serve as a
11 transit-only lane during peak traffic hours and an emergency road
12 shoulder.

13 The lane would extend from 41st Avenue N.E. to the Kenmore Park
14 and Ride lot, entirely within existing right-of-way. Approximately
15 .157 acre of the project will be within 200 feet of the ordinary high
16 water mark of Lake Washington. Some of this small shoreline area is
17 in Lake Forest Park and some is in unincorporated King County.

18 2

19 SR 522 extends around the north shore of Lake Washington,
20 providing a heavily traveled link between downtown Seattle and the
21 suburban communities north and northeast of the lake. It has been a
22 four-lane state highway since 1933.

23 Since 1975, the project area has been served by a westbound
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1 (morning commute) transit shoulder lane. The present proposal would
2 add such a lane to the opposite or eastbound side, to be used by buses
3 during the afternoon commute. At present, during the afternoon peak,
4 the highway is at level of service F--the WSDOT designation for an
5 at-capacity roadway. The designation denotes stop and go congestion
6 representing the worst level of service in the rating system.

7 3

8 When built, the additional eastbound lane will be marked with the
9 diamond symbol at intervals to indicate the restricted character of
10 the allowed use. Signs will be placed describing the restrictions.

11 The new lane be available at all times when emergency vehicles
12 have to use the highway. Transit use will be restricted to the hours
13 of the afternoon commute, between 3 and 6 p.m., or between 3:30 and
14 6:30 p.m. The rest of the time emergency use only will be authorized.

15 4

16 The project area is a densely populated corridor. There is
17 residential development on both sides of the highway along much of the
18 segment.

19 Near the west end is the busy intersection of SR 522 and
20 Ballinger Way. (SR 104) The commercial center of Lake Forest Park
21 lies northwest (inland) of this intersection. There is also
22 commercial development along the eastern portion of the project, an
23 area well out of the 200 foot shoreline strip.

1 Paralleling the project to the south is the Burke-Gilman Trail, a
2 much-used recreational pathway maintained by King County.

3 Beach Drive Northeast runs between the Burke-Gilman Trail and the
4 lake from a point opposite the Ballinger Way intersection eastward
5 perhaps a third of a mile. Waterward of this roadway are numerous
6 lakeside homes. It is an old, established neighborhood.

7 5

8 The additional lane will occupy 12 feet of a 14 feet wide new
9 paved strip. The cement barrier which now sits near the edge of the
10 eastbound roadway will be relocated to just beyond the edge of the new
11 lane through the segment paralleling Beach Drive Northeast.

12 On completion of the project the entire highway will be comprised
13 of four 10-foot wide general purpose traffic lanes, bordered by
14 transit/emergency lanes of 12 feet each on either side.

15 Curbs, gutters and sidewalks will be installed at the edge of the
16 new lane in the commercial area at the eastern end of the project.

17 6

18 Traffic signals will be reworked at seven intersections along the
19 route, and buses using the transit lane during the afternoon commute
20 will be subject to them. The ability of eastbound buses to bypass the
21 line of automobiles clogging the general purpose lanes will result in
22 an estimated time savings for buses along the project route of two to
23 two and one-half minutes.

In the area of Beach Drive Northeast, there is between the lake and SR 522 a significant gain in elevation. The existing lakefront homes generally lie only a few feet above the level of the lake. Beach Drive Northeast is around six feet above the lake; the Burke-Gilman Trail is about 12 feet above the lake; the highway is nearly 40 feet above the lake.

There is a rather steep bank between the trail and the highway, covered with native vegetation.

Construction of the project will include 1800 feet of retaining wall between the highway and the Burke-Gilman Trail below. A stairway will be built from SR 522 at the east end of the retaining wall (near the Uplake Medical/Dental Building) to the trail.

Widening the highway and building the retaining wall will include clearing, excavation and drainage system improvements. No large trees will be removed. Replanting of shrubs will occur and natural vegetation will be allowed to reassert itself. The wall will be finished in a rough textured "fractured fin" finish. Boston Ivy will be planted at 12 foot intervals. In most places, the retaining wall will ultimately be obscured by vegetation.

Addition of the new lane will not add much traffic to the

1 eastbound roadway. The gaps left by buses using the new lane during
2 rush hour will rapidly fill with other vehicles, but the effect is
3 probably an increase of less than one percent in vehicular traffic.

4 The overall effect of this change on noise levels perceived off
5 the traveled roadway will not be audible.

6 Of greater influence on noise will be the repositioning of the
7 cement barrier, some 12 feet further from the edge of the general
8 purpose lanes than it is now. For residents of Beach Drive Northeast
9 to the south, this will tend to attenuate the present sound levels to
10 a modest degree. Residences to the north of the highway will
11 experience no perceptible change in noise.

12 10

13 Potentially the most dramatic change in the visual scene
14 resulting from the project is presented by the retaining wall.
15 However, the planned finish of the wall's face and the landscaping of
16 the bank will largely mitigate any intrusive effect.

17 Joggers and other trail users will be obliged to look above them
18 to even see the wall. We do not believe the view from the trail--now
19 of a steep bank in natural vegetation--will be substantially
20 diminished by the project.

21 The houses on Beach Drive Northeast are oriented toward the
22 lake. The retaining wall lies behind them. Even so, views to the
23 rear of the residential properties will not, we believe be
24

1 significantly adversely affected.

2 Moreover, we do not think the project will interfere appreciably
3 with views from properties located north of the highway. Residences
4 on the north with lake views are situated above the highway on a
5 rapidly rising slope. The extra lane and cement barrier may block
6 some views of roof lines, but will not eliminate views of the water.

7 In short, we find no significant adverse aesthetic affects from
8 the project.

9 11

10 We find that the project will not cause a reduction in access at
11 the intersections with Ballinger Way and Brookside.

12 12

13 Surface water runoff from this highway segment eventually finds
14 its way to Lake Washington. Along the entire 2.5 mile length of the
15 project, a total of only about two acres of new impervious surface
16 will be added.

17 Stormwater is routed through drains to culverts. The project
18 will involve some lengthening of existing culverts. There are no
19 stormwater detention facilities. Increased stormwater runoff from the
20 added lane will be minimal in relation to the entire area of drainage
21 traversed by the project. Given the minor project-related traffic
22 increase and the limited use of the new lane, it is unlikely that the
23 proposal will result in a significant increase in pollutants from
24

1 surface runoff.

2 Above Beach Drive Northeast in the vicinity of the Burke-Gilman
3 Trail, the WSDOT stormwater works discharge to a system of grass-lined
4 ditches maintained by King county. The County's portion of the system
5 is poorly maintained and frequently becomes overloaded, causing
6 localized flooding.

7 Stormwater discharges along the project route also go directly
8 into several watercourses tributary to Lake Washington. The largest
9 of these are McAleer and Lyons Creeks and the Sammamish River. WSDOT
10 has obtained a hydraulic project approval for storm sewer/drainage
11 changes from the Department of Fisheries. In addition to other
12 conditions designed to protect fish, the approval calls for the
13 installation of three oil/water separators.

14 13

15 Grass-lined ditches can provide effective treatment of stormwater
16 runoff through biofiltration. On the present record, it appears that
17 portions of the existing system for biofiltration lacks sufficient
18 capacity to handle predictable flows, because of inadequate ditch size
19 or inadequate maintenance or both. Moreover, biofiltration is not
20 available at all over much of the project.

21 14

22 The new transit/emergency lane does not in itself or additively
23 create an increased risk of fire, explosion or hazardous waste spill.

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About 80% of the traffic over SR 522 can be characterized as regional, rather than purely local. It is an important commuter corridor. To the extent that the instant project improves transportation along this route it confers a regional benefit.

The proposal will be an improvement in two areas: safety, and time of passage for buses. The safety benefits are probably the most significant.

The new lane provides an avenue for emergency response for fires, accidents or medical emergencies. Where minutes or seconds are often crucial, the improved emergency access may in some cases be the difference between life and death.

During off-peak hours, the new lane will also provide a place for disabled vehicles to pull out of the general purpose lanes.

Entry, exit and intersection turns will be aided by the presence of an extra lane for short-distance use in merging into or leaving the general purpose lanes. The extreme difficulty in merging now experienced by buses will be eliminated.

Pedestrian safety will be improved in the areas where sidewalks and curbs are constructed to separate the traveled road from the walking area. In the stretch adjacent to the retaining wall, roadside space will still not be available to pedestrians. However, pathways and stairs will allow pedestrians in this area simply to re-route

1 themselves to the relative safety of the Burke-Gilman Trail.

2 The two to two and one-half minute speed-up in peak hour bus
3 passage is a modest gain, but nonetheless a gain in a corridor
4 experiencing serious congestion. An effect will be improved
5 reliability in meeting the bus schedule. The influence of this
6 improvement will be in the direction of increased transit ridership
7 and away from use of low-occupancy automobiles.

8 16

9 At present the accident rate in the project area is consistent
10 with expectations for roads at level of service F. After the new lane
11 is added, lane widths and turning radii will remain satisfactory from
12 the safety standpoint. No significant safety negatives, offsetting
13 the safety gains from the project are apparent.

14 Moreover, it is speculation by the City that the bus passage
15 gains will ultimately be lost because the new lane will be eventually
16 converted to a general purpose lane. The weight of evidence is that
17 such change is not a likely probability.

18 17

19 The worst meteorological conditions for air quality tend to occur
20 most frequently on cold, clear, calm days from mid-November through
21 February. Air monitoring of carbon monoxide, particulates and lead
22 was conducted in late October and early November. During the sampling
23 period, stagnant conditions similar to those expected in winter, were
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(14)

1 encountered.

2 The results showed that current air quality along the project
3 corridor is well within the national ambient air quality standards for
4 the criteria pollutants. The national standards are established to
5 protect health with a reasonable margin of safety.

6 Carbon monoxide peaks correlated closely with peak traffic
7 periods. However, the same correlation was not found for
8 particulates--indicating a major contribution from non-transportation
9 sources, most probably woodstoves.

10 Toxic (non-criteria) air pollutant exposures do not appear to be
11 approaching levels of public health significance in the project area.

12 Computer modeling was used to predict the air quality effects of
13 the added lane over time, given liberally estimated traffic increases
14 and reasonably anticipated places and times of exposure. The models
15 used were screening models, assuming the co-existence of worst case
16 meteorology and worst case traffic, and designed to overpredict
17 pollutants. Based on state of the art prediction techniques, the
18 addition of the eastbound transit/emergency lane is not likely to
19 cause significant adverse impacts on air quality.

20 17

21 The WSDOT briefly examined the alternative of adding the new lane
22 to the north side of SR 522, and then redesignating the various lanes
23 to produce the same configuration as in the proposal under review.

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(15)

1 They decided that this approach had no advantages. It would still be
2 partially in the shoreline, it would involve land acquisition costs,
3 it would necessitate cutting the bank and building a retaining wall as
4 high as 35 feet--a massive structure clearly visible from the lake and
5 difficult to successfully disguise with vegetation.

6 Non-structural alternatives involving a no-build approach coupled
7 with various strategies for discouraging population or diminishing
8 demand for transportation were not considered by WSDOT in deciding to
9 go ahead with the new lane for SR 522. On the record presented to us,
10 such alternatives appear remote and speculative to solving SR 522
11 highway's immediate congestion problem. Moreover, such broad-scale
12 approach is often performed at the regional government level. The
13 proposed transit/emergency lane is included in the regional plans of
14 the Puget Sound Council of Governments, the King County Comprehensive
15 Plan and the Northshore Community Plan.

16 18

17 Adverse effects of the project on recreational use of the
18 Burke-Gilman Trail will not be significant. As noted, the aesthetic
19 impacts will be minor. No perceptible additional noise will be
20 experienced. No physical encroachment will be involved. The
21 retaining wall will not substantially increase shadowing. Views to
22 the water will not be blocked. There is no evidence that use of part
23 of the trail as a pedestrian bypass will interfere with other uses of
24

1 the pathway. In short, the trail experience will not be much affected
2 by development of the extra traffic lane.

3 19

4 The value of residential properties on Beach Drive Northeast has
5 gone continuously upwards in recent years, despite the local notoriety
6 of plans for the new traffic lane. Moreover this increase has
7 occurred with the present highway at level of service F.

8 The houses along this street are Lake Washington waterfront,
9 oriented to the water. They are separated from the highway by the
10 Burke-Gilman Trail, by Beach Drive Northeast itself, and by a lower
11 elevation. The proposed lane addition, which will modestly improve
12 overall transportation conditions in the corridor, will not intrude
13 significantly on the quality of waterfront living. We find that it
14 will not have an adverse effect on existing property values along
15 Beach Drive Northeast.

16 20

17 On consideration of the entire record before us, we find that the
18 project is not reasonably likely to cause a more than moderate effect
19 of the proposal on the quality of the environment.

20 There have been no substantial changes to the proposal since the
21 DNS was issued in 1986. No significant new information proving
22 probable significant adverse environmental impacts has come to light
23 in the interim.

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(17)

The Lake Washington Regional Shoreline Goals and Policies was published in 1973 by a citizens committee representing communities from around the entire lake, including Lake Forest Park.

In 1974 the director of the Department of Ecology approved several documents, including the Goals and Policies, as constituting the City's master program. The City was asked to republish the various components as a single document and provide evidence of its official adoption by the City.

The requested actions by the City were never taken. However, on January 30, 1980, the Department of Ecology adopted an Order incorporating the approved master program into the Washington Administrative Code. See WAC 173-19-2513.

All approved master programs are incorporated as an appendix to the administrative code, rather than being set forth in the text. Copies of the appendix are available to the public for inspection in the headquarters of the Department of Ecology. See WAC 173-19-050.

The Department of Ecology's official shorelines file on Lake Forest Park includes the letter of approval, a 1973 Land Use Ordinance (Ordinance No. 204), and a 1972 Comprehensive Plan for the City.

The local comprehensive plan and zoning ordinances have been amended by Lake Forest Park in recent years, but no amendment to the shoreline master program has ever been submitted to Ecology for approval.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

1

The Board has jurisdiction over the parties and subject matter. Chapter 90.58 RCW.

2

We review substantial developments for consistency with the applicable master program and the provisions of the Shoreline Management Act (SMA). RCW 90.58.140(2)(b).

3

A preliminary question in this case is whether there is an applicable master program and, if so, what does it contain.

Adoption in 1980 of WAC 173-19-2513, formally incorporating the Lake Forest Park Program into the administrative code made that program an effective state regulation. RCW 90.58.120. The program's provisions then became the applicable use regulations for shorelines within the City's boundaries. RCW 90.58.100(1).

The program adopted is required to be on file at, among other places, the offices of the Department of Ecology. RCW 96.58.120. We conclude that the best evidence of the contents of the approved master

1 program is what is contained in the official file maintained at
2 Ecology, the approving agency. See RCW 90.58.090.

3 Ecology's file makes clear that the Lake Washington Regional
4 Shoreline Goals and Policies were intended to be the basic policy
5 document included within the plan. The other parts of the approved
6 plan are, we hold, the two other documents in Ecology's file: the
7 1973 Land Use Ordinance (Ordinance No. 204) and the 1972 Comprehensive
8 Plan.

9 4

10 Neither the parties nor our review have brought to our attention
11 a provision of the 1973 Land Use Ordinance or 1972 Comprehensive Plan
12 which is relevant here. Therefore our review of master program
13 consistency is confined to those provisions of the Lake Washington
14 Regional Shoreline Goals and Policies which were raised as issues.

15 In its Circulation Element that document sets forth as a goal:

16 *A balanced transportation system for moving people*
17 *and goods is to be encouraged within existing*
18 *corridors.*

19 Policies in pursuit of this goal include a statement that "no
20 additional vehicular corridors should be established across the
21 lake." The narrative introducing the circulation element states: "In
22 the long term, urban areas should look toward alternatives to the
23 automobile as the primary means of transportation."

The Conservation Element of the Goals and Policies is primarily directed toward preserving remaining natural areas around the lake's shoreline.

The instant project is within an existing transportation corridor, and does not open up a new cross lake corridor. Its prime purposed is to enhance mass transit as an alternative of automobile transportation. It does not represent development within a natural area.

We conclude that the proposal is consistent with the Lake Washington Regional Shoreline Goals and Policies, and thereby, also consistent with the Lake Forest Park Shoreline Master Program.

5

With one qualification, we further conclude that the proposal is consistent with the policy of the underlying statute--the SMA-- as expressed in RCW 90.58.020.

The shorelines involved are shorelines of statewide significance, RCW 90.58.030(2)(e)(iv), and subject to the preferences for such shorelines. The proposal furthers the statewide interest over the local interest in promoting a necessary transportation system serving a broad area. See, Sadleir-Orme v. Seattle, SHB No. 84-41 (1985). It does so, moreover, without significant adverse impact on natural or environmental values, and with no detriment to shoreline public access. Compare, Washington Environmental Council v. Douglas County,

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(21)

1 SHB No. 86-34, et al. (1988). Thus, the instant project is consistent
2 with he preferences for shorelines of statewide significance.

3 The project is also consistent with those policies of the SMA
4 which apply to all shorelines. Permitted uses must be "designed and
5 conducted in a manner to minimize, insofar as practical, any resultant
6 damage to the ecology and environment of the shoreline area." Our
7 review convinces the Board that WSDOT's plans for building and
8 implementing use of the new lane fully meet this standard, except with
9 regard to stormwater drainage.

10 6

11 The WSDOT has agreed, through its closing brief, to a condition
12 that surface water be channeled wherever feasible into grass-lined
13 ditches in the final design. In light of the objective of minimizing
14 environmental damage, we agree that biofiltration should be
15 incorporated into the project to the greatest extent practical.

16 Further, the new traffic lane will have some minor impact on the
17 existing overburdened drainage system along Beach Drive Northeast.
18 Although this system is maintained by King County, WSDOT is required
19 to confer with the County and participate in determining the system
20 design configuration to adequately handle the anticipated load. In
21 addition, WSDOT is to explore with the County possible contractual
22 arrangements for performing needed maintenance on the system.

Our ruling that Lake Forest Park is precluded from raising SEPA (State Environmental Policy Act) issues, did not affect the ability of the Beach Drive Northeast Association to do so. The joint presentation made by these parties blurred matters in this regard. However, because we conclude the DNS in this case was properly issued, this matter need not be sorted out.

We evaluated the probability of significant adverse environmental impacts in the relevant issue areas: noise, aesthetics, road access, water drainage, emergencies, regional benefits, air quality, recreational impact and property values. In none did we find that the probable impacts would exceed the significance threshold. See Finding of Fact 20. Therefore, we must sustain the DNS. WAC 197-11-340(1); ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

We likewise conclude that no intervening information or project changes came to light after the issuance of the DNS and the Board hearing, which would legally dictate the withdrawal of the DNS. WAC 197-11-340(3).

Prior to meeting the threshold SEPA determination, WSDOT had no obligation to evaluate alternatives to the proposal. The threshold determination is to decide whether the very project being considered will likely have a significant adverse environmental effect. Only if

1 it is decided that the project will likely have such an adverse effect
2 is it then necessary under SEPA to address alternative less harmful
3 ways of accomplishing the project. See, Murden Cove Preservation
4 Association v. Kitsap County, 41 Wn.App. 515, 525, 704 .2d 1242 (1985).

5 9

6 Our conclusions on the DNS and on shorelines law consistency are
7 the same whether we look solely at the 200 feet shoreline strip here
8 or at the entire project area. Therefore, we do not find it necessary
9 to resolve the various questions of possible jurisdictional limitation
10 posed by issues 6, 7 and 9.

11 Similarly, we need not answer the legal question posed by issue 8
12 (impacts of converting new lane to general purpose), because we have
13 found (Finding of Fact 16) that such change is not reasonably likely.

14 10

15 Any Finding of Fact which is deemed a Conclusion of Law is hereby
16 adopted as such.

17 Based on the forgoing Conclusions of Law, the Board enters the
18 following:

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(24)

ORDER

The decision of the City of Lake Forest Park is REVERSED. The matter is REMANDED to the City for the issuance of a shoreline substantial development permit, consistent with this Opinion.

The decision of King County is AFFIRMED, with the exception of conditions in Conclusion of Law 6, above, relating to stormwater drainage. The matter is REMANDED to the County for the issuance of a permit consistent with this Opinion.

DONE this 26th day of May, 1992.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Attorney Member

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Nancy Burnett
NANCY BURNETT, Member

David Wolfenbarger
DAVID WOLFENBARGER, Member

O'Dean Williamson
O'DEAN WILLIAMSON, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF TWO SHORELINE
SUBSTANTIAL DEVELOPMENT PERMITS,
ONE GRANTED BY KING COUNTY AND
ONE DENIED THE CITY OF LAKE
FOREST PARK TO DEPARTMENT OF
TRANSPORTATION (SR 522),

BEACH DRIVE NORTHEAST,

Appellant,

v.

KING COUNTY and STATE OF
WASHINGTON DEPARTMENT OF
TRANSPORTATION,

Respondents.

and

DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

CITY OF LAKE FOREST PARK,

Respondent.

SHP Nos. 87-50 and 88-47

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

1 On May 16, 1989, the Washington State Department of
2 Transportation filed a Motion for Partial Summary Judgment seeking to
3 dismiss any issue raised by the City of Lake Forest Park under the
4 State Environmental Policy Act RCW 43.21C. A memorandum in Support
5 was filed then, also.

6 On May 26, 1989, the City of Lake Forest Park filed a Reply
7 Memorandum to the above Motion.

8 On June 2, 1989, Department of Transportation filed a Response.
9 Having considered the legal argument of the parties and being fully
10 advised, the Board concludes:

11 1. That there is no genuine issue of material fact with regard
12 to this Motion to dismiss SEPA issues.

13 2. That on June 30, 1986, the Department of Transportation (DOT)
14 issued a threshold Determination of Non-Significance (DNS) for the
15 proposed highway at issue.

16 3. That the DNS and supporting environmental checklist were sent
17 to the City of Lake Forest Park (City) by DOT on June 30, 1986.
18 Comment was invited by July 15, 1986.

19 4. That the City neither assumed lead agency status nor made
20 comment on the DNS by July 15, 1986.

21 5. That DOT neither withdrew the DNS nor issued a modified DNS.

22 6. That until sometime in 1987, the City was unaware that part
23 of the proposal is within the City's shoreline area. Upon learning
24 that the proposal falls, in part, within its shorelines, the City
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entertained an application for a substantial development permit from DOT.

7. That subsequently on September 21, 1988, the City denied a shoreline substantial development permit to DOT.

8. That in an appeal of that permit denial by DOT to this Board, the City now seeks to challenge the DNS issued by the Department, which challenge is opposed by this Motion of the Department.

Wherefore the Board concludes:

1. The SEPA regulations bar the City's challenge to DOT's DNS.
DOT as the agency initiating the proposal properly assumed the role of "lead agency" for SEPA purposes. WAC 197-11-926.

As an entity with authority to approve or deny a necessary permit for the proposal at issue, the City is an "agency with jurisdiction". WAC 197-11-714(3).

DOT properly consulted the City, an agency with jurisdiction, when the DNS was issued. WAC 197-11-340(2)(b).

When consulted, the City had a responsibility to comment, in a timely and specific manner. WAC 197-11-502(2). The comment period for a DNS is 15 days. WAC 197-11-502(3).

WAC 197-11-545(1) deals with the effect of no comment by a consulted agency. This subsection bars challenge to an EIS by a consulted agency where such agency failed to make substantive comments in response to the draft EIS - a principle effectively established in

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2 Kitsap County v. Department of Natural Resources, 99 Wn.2d 386, 662
3 P.2d 381 (1983).

4 WAC 197-11-545(1) is silent on the effect of no comment by a
5 consulted agency on a DNS. However, this silence does not mean that
6 agencies with jurisdiction are free to challenge DNS's after the
7 comment period has run. The SEPA rules provide for those agencies
8 another mechanism for remedying dissatisfaction with a DNS -
9 assumption of lead agency status. WAC 197-11-600(3).

10 The time for assuming lead agency status is the same 15 day
11 period required for commenting on a DNS. WAC 197-11-340(2)(e); WAC
12 197-11-948.

13 When a DNS is issued, it is final and binding on other agencies,
14 unless an agency with jurisdiction assumes lead agency status. WAC
15 197-11-390. Becoming the lead agency, thus, is the exclusive remedy
16 for an agency with jurisdiction which has objections to a DNS.

17 The net effect of these rules is to bar future objections to a
18 DNS by an agency which failed to assume lead agency status during the
19 15 day comment period. Department of Fisheries v. Mason County, SHB
20 No. 88-26 (Order Granting Partial Summary Judgment, April 13, 1989).

21 2. The City's ignorance of the proposal's location within it's
22 shorelines does nothing to alter the effect of the SEPA regulations.

23 The factual peculiarity of the instant case is that the City,
24 though always in fact an agency with jurisdiction, was unaware of the
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2 fact until long after issuance of the DNS and long after the period
3 for assumption of lead agency status had passed.

4 On reflection, we have decided that the City's misapprehension on
5 this point does nothing to change the impact of the SEPA regulations,
6 Chapter 197-11 WAC. As we stated in our earlier Order Denying Motion
7 to Dismiss, dated May 16, 1989, the regulatory scheme makes the City
8 responsible for knowing what proposals, within its geographical
9 boundaries it holds approval authority over. The facts on the ground
10 are determinative of the City's jurisdiction and attendant duties, not
11 the state of knowledge of its officials.

12 3. The policy favoring early environmental assessment is
13 promoted by foreclosing late SEPA appeals.

14 The City's permit decision here came over two years after the DNS
15 was issued and the comment period closed. During that time the DNS
16 was not withdrawn. See WAC 197-11-340(3).

17 In Kitsap County, supra, the Court, commenting on the prior SEPA
18 guidelines, noted:

19 The SEPA guidelines were structured in such a way
20 as to require consulted agencies to participate in
21 the SEPA process at a time when their
22 participation is meaningful and contributes to the
23 environmental assessment at the earliest possible
24 opportunity.

25 We perceive the same intentions in the new SEPA rules promulgated in
26 Chapter 197-11 WAC. To allow the resurrection of SEPA issues here

1 after so much time has passed, would negate the assumption of lead
2 agency provisions of the rules.
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27 ORDER GRANTING MOTION
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ORDER

By prior ruling, entered May 16, 1989, we decided that the City's proceedings on the DOT's substantial development permit application could not require the preparation of an EIS by DOT, absent the assumption of lead agency status by the City. We denied the City's contention that its proceedings, challenged only by appeal to this Board, conclusively adjudicated that an EIS was necessary. In the context of that ruling, we stated that the Board has jurisdiction to review SEPA compliance.

Now we exercise that jurisdiction and determine that DOT's DNS is, by operation of WAC 197-11-390, final and binding upon the City of Lake Forest Park.

THEREFORE, IT IS ORDERED that the DOT's Motion for Partial Summary Judgment is GRANTED.

This Order is dispositive of Issue No. 4, set forth in the Pre-Hearing Order herein, entered on June 2, 1989.

DONE this 18th day of September, 1989.

SHORELINES HEARINGS BOARD

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WICK DUFFORD, Presiding

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